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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

TODD DUNNING AND DUNNING ENTERPRISE, INC.

Date: June 26, 2009
Time: 9:00 a.m.
Judge: Honorary Jeremy Fogel

6 Defendants Kessler's Flying Circus, Thunderwood Holdings, Inc., Brian
7 Dunning and BrianDunning.com (collectively, "KFC Defendants") submit the following
8 Evidentiary Objections to the Declaration of Colleen M. Kennedy, which was submitted in
9 support of Ebay, Inc.'s Consolidated Opposition To (1) The Motions To Dismiss The Second
10 Amended Complaint By Defendants Digital Point Solutions, Inc., Shawn Hogan, Thunderwood
11 Holdings, Inc., Kessler's Flying Circus, Brian Dunning, Briandunning.com, Todd Dunning,
12 and Dunning Enterprise, Inc.; and (2) The Motions To Transfer By Defendants Digital Point
13 Solutions, Inc., Shawn Hogan, Todd Dunning and Dunning Enterprise, Inc.:

DECLARATION OF COLLEEN M. KENNEDY

DATED JUNE 5, 2009^{1/}

| TESTIMONY | EVIDENTIARY OBJECTIONS |
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| 1. I am a member of the Bar of the State of California and am associated with the law firm of O'Melveny & Myers LLP, counsel of record for Plaintiff eBay Inc. ("eBay"). I submit this declaration in support of eBay's Consolidated Opposition to the Motions to Dismiss the Second Amended Complaint by Defendants Digital Point Solutions, Inc. and Shawn Hogan (collectively, the "DPS Defendants"); Thunderwood Holdings, Inc., | 1. Objection as to personal knowledge of Declarant as specified below. |

28 ^{1/} Paragraph numbers track Ms. Kennedy's declaration and underscoring reflects the particular statements to which the KFC Defendants object.

1 Kessler's Flying Circus ("KFC"), Brian
2 Dunning, and briandunning.com
3 (collectively, the "KFC Defendants"); Todd
4 Dunning and Dunning Enterprise, Inc.
5 (collectively, the "TD Defendants"); and the
6 Motions to Transfer by the DPS Defendants
7 and the TD Defendants. I have personal
8 knowledge of the facts set forth in this
9 declaration and, if called to testify as a
10 witness, could and would do so competently.

11 2. Defendants' motions raise a number of
12 factual issues inappropriate to a motion to
13 dismiss. Even if the Court chose to convert
14 any of Defendants' motions to a motion for
15 summary judgment, discovery would be
16 required on a number of facts essential to
17 any summary judgment ruling. A summary
18 judgment ruling on the issues raised by
19 Defendants would require resolution of at
20 least the following disputed factual Issues:
21 a. There is a factual dispute
22 regarding the existence and terms of any
23 binding agreement between Defendants and
24 Commission Junction, Inc. ("CJ").
25 Specifically, there are unresolved questions
26 of fact regarding: (1) whether any binding
27 agreement was ever entered into between any
28 Defendant and CJ; (2) which Defendants

2. Objection. This is argument, not a declaration of facts. These statements should not be considered by the Court because the statements constitute a transparent and bad faith attempt to exceed the page limitation ordered by the Court, and are not otherwise admissible evidence.

1 entered into such binding agreements, if any;
2 (3) when any such binding agreements were
3 executed; and (4) the terms of any such
4 binding agreements. There is likely to be
5 evidence controverting Defendants'
6 statements on these issues in light of the
7 inconsistent positions Defendants have taken
8 in this litigation and in their separate
9 litigation with CJ (the "CJ Action"), as
10 discussed in eBay's Consolidated Opposition
11 to Defendants' Motions to Dismiss and
12 Motions to Transfer ("Opposition").

13 b. There is a factual dispute
14 regarding whether, to the extent any binding
15 Publisher Service Agreement ("PSA")
16 existed between any of the Defendants and
17 CJ that contained a contractual limitations
18 provision triggered by termination of the
19 PSA, such termination ever occurred. There
20 is also a dispute of fact as to when any such
21 termination occurred, if it did. There is
22 likely to be evidence controverting
23 Defendants' statements on these issues in
24 light of the inconsistent positions Defendants
25 have taken in this litigation and in the CJ
26 Action, as discussed in eBay's Opposition.

27 c. There is a factual dispute
28 regarding whether CJ had any authority to

1 release the claims asserted by eBay in this
2 litigation through the agreement it entered
3 into with the KFC and TD Defendants to
4 settle the CJ Action. Specifically, there are
5 unresolved questions of fact regarding: (1)
6 whether any agreement exists that expressly
7 creates an agency relationship between CJ
8 and eBay for purposes of litigation; (2)
9 whether eBay asserted any control over CJ
10 during the course of the prosecution and
11 settlement of the CJ Action; (3) whether CJ
12 representatives believed CJ was acting as
13 eBay's agent for purposes of the settlement;
14 (4) whether Defendants believed that CJ was
15 acting as eBay's agent for purposes of the
16 settlement; (5) whether any such belief was
17 reasonable under the circumstances;
18 (6) whether any such belief was caused by
19 some act or neglect by eBay; (7) whether
20 Defendants investigated the scope of CJ's
21 authority in connection with the settlement;
22 (8) whether eBay's claims were discussed
23 during the negotiation of the settlement
24 agreement; (9) whether CJ made any
25 representations about its authority to release
26 eBay's claims; and (10) whether the parties
27 intended CJ's release of its claims to release
28 eBay's claims as well. There is likely to be

1 controverted evidence on these issues in light
2 of the facts known to eBay and the positions
3 taken in Defendants' motions.
4 d. There is a factual dispute
5 regarding the diligence of eBay's inquiry
6 into Defendants' fraudulent schemes and, to
7 the extent Defendants claim that eBay was
8 unreasonable in relying on Defendants'
9 fraudulent representations, the
10 reasonableness of eBay's reliance thereon.
11 Specifically, there are umesolved questions
12 of fact regarding: (1) the investigation and
13 other actions taken by eBay in response to
14 various statements regarding Defendants'
15 fraudulent schemes; (2) the difficulty of
16 detecting such schemes; (3) the technological
17 and other methods used by Defendants to
18 conceal their schemes; and (4) the nature of
19 the analysis undertaken by eBay that
20 ultimately uncovered Defendants' schemes.
21 There is likely to be controverted evidence
22 on these issues in light of the facts known to
23 eBay and the positions taken in Defendants'
24 motions.

25 3. Many of the facts relevant to these factual
26 disputes are in the exclusive knowledge of
27 Defendants and third parties, including facts
28 related to any agreement between Defendants

3. Objection. This is argument, not a declaration of facts. These statements should not be considered by the Court because the statements constitute a transparent and bad

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| <p>1 <u>and CJ, the termination of any such</u> 2 <u>agreement, statements made during the</u> 3 <u>negotiation of the settlement of the CJ</u> 4 <u>Action, and the nature of Defendants'</u> 5 <u>technological methods.</u></p> | <p>faith attempt to exceed the page limitation ordered by the Court, and are not otherwise admissible evidence.</p> |
| <p>6 <u>4. Discovery regarding the above-listed</u> 7 <u>disputed factual issues has not been</u> 8 <u>completed for a number of reasons, most</u> 9 <u>within Defendants' control. First, several of</u> 10 <u>these factual issues were raised for the first</u> 11 <u>time in Defendants' recent motions to</u> 12 <u>dismiss and were unanticipated by eBay,</u> 13 <u>including issues related to the purported</u> 14 <u>termination of the PSA and the settlement</u> 15 <u>agreement between Defendants and Cl.</u> 16 <u>Second, in response to the discovery</u> 17 <u>propounded by eBay to date, Defendants</u> 18 <u>have asserted their Fifth Amendment rights</u> 19 <u>against self-incrimination and have also</u> 20 <u>contended that the documents responsive to</u> 21 <u>eBay's requests are in the possession of the</u> 22 <u>FBI and therefore unavailable. Because</u> 23 <u>Defendants have asserted their Fifth</u> 24 <u>Amendment rights, because the TD and KFC</u> 25 <u>Defendants refused to provide testimony in</u> 26 <u>the CJ Action based upon their Fifth</u> 27 <u>Amendment rights, and because certain of</u> 28 <u>the Defendants have indicated their intention</u></p> | <p>4. Objection. This is argument, not a declaration of facts. These statements should not be considered by the Court because the statements constitute a transparent and bad faith attempt to exceed the page limitation ordered by the Court, and are not otherwise admissible evidence.</p> |

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| <p>1 <u>to seek a stay of this action pending the</u> 2 <u>resolution of the criminal investigation</u> 3 <u>against them, eBay expects that Defendants</u> 4 <u>will continue to refuse to provide discovery</u> 5 <u>responses, including deposition testimony,</u> 6 <u>on any subject until that investigation has</u> 7 <u>concluded. Third, discovery has not been</u> 8 <u>completed in this action and is not currently</u> 9 <u>scheduled to be completed until November</u> 10 <u>20, 2009.</u></p> | |
| <p>11 <u>5. Attached hereto as Exhibit I is a true and</u> 12 <u>correct copy of the Joint Trial Brief filed by</u> 13 <u>the TD and KFC Defendants in the CJ</u> 14 <u>Action, dated March 6, 2009.</u></p> | <p>5. Objection. Not relevant (Federal Rule of Evidence ("FRE") 402)</p> |
| <p>15 <u>6. Attached hereto as Exhibit 2 is a true and</u> 16 <u>correct copy of eBay's Requests for</u> 17 <u>Production to Digital Point Solutions, Inc.,</u> 18 <u>dated January 22, 2009.</u></p> | <p>6. Objection. Not relevant (FRE 402).</p> |
| <p>19 <u>7. Attached hereto as Exhibit 3 is a true and</u> 20 <u>correct copy of KFC's Responses to eBay's</u> 21 <u>First Set of Requests for Production, dated</u> 22 <u>February 25, 2009.</u></p> | <p>7. Objection. Not relevant (FRE 402).</p> |
| <p>23 <u>8. Attached hereto as Exhibit 4 is a true and</u> 24 <u>correct copy of Thunderwood Holdings,</u> 25 <u>Inc.'s Responses to eBay's First Set of</u> 26 <u>Requests for Production, dated February 26,</u> 27 <u>2009.</u></p> | <p>8. Objection. Not relevant (FRE 402).</p> |
| <p>28 <u>9. Attached hereto as Exhibit 5 is a true and</u></p> | <p>9. Objection. Not relevant (FRE 402).</p> |

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| 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 | <p><u>correct copy of BrianDunning.com's Responses to eBay's First Set of Requests for Production, dated February 26, 2009.</u></p> <p><u>10. Attached hereto as Exhibit 6 is a true and correct copy of Dunning Enterprises, Inc.'s Responses to eBay's First Set of Requests for Production, dated February 26, 2009.</u></p> <p><u>11. Attached hereto as Exhibit 7 is a true and correct copy of Brian Dunning's Responses to eBay's First Set of Requests for Production, dated February 26, 2009.</u></p> <p><u>12. Attached hereto as Exhibit 8 is a true and correct copy of T. Dunning's Responses to eBay's First Set of Requests for Production, dated February 26, 2009.</u></p> <p><u>13. Attached hereto as Exhibit 9 is a true and correct copy of Shaw Hogan's Responses to eBay's First Set of Requests for Production, March 12, 2009.</u></p> <p><u>14. Attached hereto as Exhibit 10 is a true and correct copy of Digital Point Solutions, Inc.'s Responses to eBay's First Set of Requests for Production, dated March 12, 2009.</u></p> <p><u>15. Attached hereto as Exhibit 11 is a true and correct copy of KFC's Responses to eBay's First Set of Requests for Admission,</u></p> | <p>10. Objection. Not relevant (FRE 402).</p> <p>11. Objection. Not relevant (FRE 402).</p> <p>12. Objection. Not relevant (FRE 402).</p> <p>13. Objection. Not relevant (FRE 402).</p> <p>14. Objection. Not relevant (FRE 402).</p> <p>15. Objection. Not relevant (FRE 402).</p> |
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| 1 | <u>February 25, 2009.</u> | |
| 2 | <u>16. Attached hereto as Exhibit 12 is a true</u> <u>and correct copy of Digital Point Solutions,</u> <u>Inc.'s Responses to eBay's First Set of</u> <u>Requests for Admission, dated March 12,</u> <u>2009.</u> | 16. Objection. Not relevant (FRE 402). |
| 7 | <u>17. Attached hereto as Exhibit 13 is a true</u> <u>and correct copy of KFC's Responses to CJ's</u> <u>Requests for Production in the CJ Action,</u> <u>dated March 13, 2008.</u> | 17. Objection. Not relevant (FRE 402). |
| 11 | <u>18. Attached hereto as Exhibit 14 is a true</u> <u>and correct copy of Todd Dunning's</u> <u>Responses to CJ's Requests for Production,</u> <u>dated March 13, 2009.</u> | 18. Objection. Not relevant (FRE 402). |
| 15 | <u>19. Attached hereto as Exhibit 15 is a true</u> <u>and correct copy of the Cross- Complaint</u> <u>filed by KFC against CJ in the CJ Action,</u> <u>dated July 25, 2008.</u> | 19. Objection. Not relevant (FRE 402). |
| 19 | <u>20. Attached hereto as Exhibit 16 is a true</u> <u>and correct copy of eBay's Subpoena to CJ</u> <u>to Produce Documents, dated May 4, 2009.</u> | 20. No objection. |

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1 21. Attached hereto as Exhibit 17 is a true
2 and correct copy of eBay's Subpoena to
3 Ernster Law Offices to Produce Documents,
4 dated May 4, 2009.

1 21. No objection.

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6 DATED: June 12, 2009

7 Respectfully submitted,
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10 RUS, MILIBAND & SMITH
11 A Professional Corporation

12 By: 

13 LEO J. PRESIADO
14 Attorneys for Defendants
15 THUNDERWOOD HOLDINGS, INC.,
16 BRIAN DUNNING and
17 BRIANDUNNING.COM

18 DATED: June 12, 2009

19 LAW OFFICES OF
20 PATRICK K. McCLELLAN

21 By: 

22 PATRICK K. McCLELLAN
23 Attorney for Defendants
24 KESSLER'S FLYING CIRCUS

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